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No. 05-352

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

CUAUHTEMOC GONZALEZ-LOPEZ.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients.[1] NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; to foster the integrity, independence and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has 10,000 members nationwide -- joined by 80 state and local affiliate organizations with 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. Because this case raises important questions concerning a criminal defendant's right to counsel of choice and the proper remedy for a court's unjustified denial of that right, NACDL offers its practical view of the attorney-client relationship.

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1. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than NACDL, has made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court. Rule 37.3(a).

SUMMARY OF ARGUMENT

The government's analysis of the consequences of denying a criminal defendant his or her counsel of choice is premised on the theory that, as long as they perform competently at trial, criminal defense counsel are fully fungible. According to the government, a criminal defendant's constitutional right to choose the attorney he wishes to represent him can be transgressed with impunity, provided that the lawyer ultimately foisted upon him meets the constitutional standards of competence at trial. However, governmental interference with a defendant's relationship with his retained counsel undermines the central understanding of what it means for a defendant to have the assistance of counsel in his defense. Moreover, given the wide range of tactical choices and approaches present in any trial and the broad standard for adjudging attorney competence at trial, in any given criminal case two lawyers could try totally different cases and be deemed competent. Furthermore, a lawyer's individualized experience, professional reputation and personal style can make a marked difference with the prosecution, with the judge, and with the jury, as well as with the client. Accordingly, for the client, defense counsel are not fungible even if they perform competently at trial, and forcing a defendant to trial with counsel not of his choice cannot remedy denying him the counsel he has chosen to retain.

Furthermore, the government overlooks the fact that a trial is not the be-all and end-all of criminal representation.[2]

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2. Indeed, over the years only a small percentage of criminal prosecutions have proceeded to trial on a nation-wide basis. ABA Standards for Criminal Justice – Prosecution Function and Defense Function, Standard 4-6.1, commentary, 205 (3d ed. 1993) ("ABA Standards"). According to the most recent statistics

Equally critical to the attorney-client relationship are the many steps between initial interview and the decision whether there will even be a trial. As the Court has long recognized, a criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). At each stage there must be trust and confidence between the defendant and his counsel. At each stage counsel chosen by the defendant must make critical decisions and assist the client in his or her choices. Indeed, a defendant afforded his counsel of choice will often avoid the extreme risk and ordeal of trial.

ARGUMENT

> We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. The differences, all within the range of effective and competent advocacy, may be important in the development of the defense. Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the sixth amendment.

United States v. Laura, 607 F.2d 52, 56 (CA3 1979) (per Higginbotham, J.)

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available, 95.7% of all federal prosecutions were resolved by guilty pleas, while only 4.3% of cases went to trial. U.S. Sentencing Commission, Sourcebook of Federal Sentencing Statistics (2003) (Table 11).

I. Competent Trial Counsel Are Not Fungible.

This Court has repeatedly recognized, in the context of effective assistance of counsel, that competent defense counsel make a broad range of choices that differ dramatically and that the process of crafting a defense requires substantial discretionary judgment. Thus, the Court has set the standard for adjudging the competence of counsel at trial as "simply reasonableness under prevailing professional norms," a standard meant to cover a "wide range of reasonable professional assistance" in order to preserve "the wide latitude counsel must have in making tactical decisions." *Strickland v. Washington*, 466 U.S. 668, 688, 689 (1984). Such wide latitude is necessary, according to the Court, because "representation is an art," and "[t]here are countless ways to provide effective assistance in any given case." *Id.* at 689, 693. As the Court has recognized, "[e]ven the best criminal attorneys would not defend a particular client in the same way." *Id.* at 689. Accordingly, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.*

In *Yarborough v. Gentry*, 540 U.S. 1 (2003), the Court expounded on counsel's "wide latitude in deciding how best to represent a client" in one particular critical stage of the trial, closing arguments, and cautioned that "deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Id.* at 8. The Court pointed out that "[c]losing arguments should 'sharpen and clarify the issues for resolution by the trier of fact' [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers." *Id.* "Indeed, it might sometimes make

sense to forgo closing arguments altogether." *Id.*, citing *Bell v. Cone*, 535 U.S. 685, 701-02 (2002). In *Bell,* the Court ruled that counsel's waiver of closing argument in the sentencing phase of a capital trial was "a tactical decision about which competent lawyers might disagree." *Id.* at 702. On the question of counsel's failure to present certain arguments to the jury in closing, the Court stated, "Focusing on a small number of key points may be more persuasive than a shotgun approach." *Yarborough*, 540 U.S. at 9. Citing experts and scholarly authority, the Court concluded, "[i]n short, judicious selection of arguments for summation is a core exercise of defense counsel's discretion." *Id.*

The broad range of competent choices and approaches which the Court explored at the closing argument stage has its parallel at each stage of the trial. At each point in a given case, competent defense counsel may take different approaches or make different decisions.

On the initial question of who will be the trier of fact, some counsel might always opt for trial by jury, whereas others may be willing to submit the matter to the judge in a given case. Where the choice is made for a jury trial, two counsel will differ greatly in jury selection, in such areas as use of a juror questionnaire, use of a jury consultant, the subjects to be explored in voir dire, and the weight (if any) to be given the defendant's own opinion of particular jurors. For any given juror, Counsel A might exercise a peremptory that Counsel B would save for another prospective juror.

Competent counsel often differ on the focus of the defense. Some counsel rely on a vigorous attack on the prosecution case, where others would opt for an affirmative defense. Some counsel are leery of alternative defenses, e.g., not guilty and not guilty by reason of insanity, for fear of losing

credibility with the jury, where others would be willing to run the risk to preserve the possibility of more than one favorable outcome.

Competent counsel may also differ on when, if at all, to make an opening statement. Some counsel make the opening right after the prosecution's in order to show that there are two sides to the story from the outset. Others prefer waiting to the close of the prosecution case-in-chief when the contours of the defense case are more settled and there is less risk of predicting evidence which later can't be produced.

Cross-examination is another area where there are major differences between counsel. Different lawyers will make very different decisions on whether to cross-examine a particular witness and, if so, the content of that cross-examination. And, style of cross-examination is a very individualized matter for every lawyer.

Counsel differ greatly on use of evidentiary objections. Some counsel hold the prosecutor to rigid adherence to the rules of evidence, where other counsel make limited use of objections to avoid alienating the jury. Similarly, some counsel make the prosecution prove its entire case, where other counsel are willing to stipulate to certain facts or testimony.

In addition to different decisions on whether to even present a defense case, counsel would often differ as to which witnesses to call, what other evidence to present, and whether to accede to the client's wishes in making the choices. Some counsel make extensive use of demonstrative evidence, audio-visual aids and expert witnesses, where others don't.

On the critical issue of whether the client will take the stand, many counsel generally oppose it because of the risk that

the client will not do well or the jury may focus too much on his or her testimony. Other counsel feel that juries do not generally acquit unless they hear the defendant's side of the story.

In closing, as in cross-examination, lawyers' styles differ greatly. Some try to be as brief as possible, where others feel a duty to explore the details of the case at length with the jury. Some may be willing to concede a particular fact, or element of an offense, or even a particular count, where others concede nothing. Some counsel will offer the jury a lesser-included offense as a compromise verdict, where others want the jury to make an all-or-nothing choice.

At each of these points, competent defense counsel might reasonably choose a different approach or make a different decision, but the different approach or different decision often will not entail constitutional incompetence or inadequacy. Rather, it would merely demonstrate the non-fungibility of competent defense counsel. The Sixth Amendment enshrines a right to retain counsel of choice. Government interference to deny a defendant his chosen counsel violates the core of that right, regardless of the competence of substitute counsel.

II. The Government's Proposed Standard For Assessing Prejudice Is Unworkable.

The government proposes that in order to vindicate his right to choose his own counsel, a defendant should be required "to show that his counsel of choice would have pursued a different defense strategy." Brief for the United States, pp. 15-16. The government, however, fails to give any meaningful definition of "defense strategy," and in practice the concept proves nebulous at best. The defense strategy at trial is actually

a series of tactical decisions, like those discussed above, made at each stage of the trial. Is any one different decision enough to be a "different defense strategy," or must there be some number of different choices or different choices at particular stages of the trial? It is precisely because defense counsel are faced with so many matters for decision at trial that the government standard is unworkable. Moreover, defense strategy is not limited to trial - it also encompasses every step from the initial interview to the decision whether to go to trial.

III. A Defense Attorney Is More Than Just the Advocate At Trial.

The government fundamentally misunderstands and minimizes the role of defense counsel vis-à-vis the client. As stated in the ABA Standards, "[t]oward the client, the lawyer is a counselor and an advocate." ABA Standard 4-1.2, commentary, 122.[3] Accordingly, "[d]efense counsel should seek to establish a relationship of trust and confidence with the accused." ABA Standard 4-3.1, p. 147. Indeed, "[n]othing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer. Thus, important evidence may not be obtained, valuable defenses neglected, and, perhaps most significant, defense counsel may not be forewarned of evidence that may be presented by the prosecution." ABA Standard 4-3.1, commentary, 149-150. In this regard, it must be recognized that "[a]t best, it is difficult for a lawyer to establish and maintain a relationship of

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3. The Court has recognized the ABA Standards as "standards to which we have long referred 'as guides to determining what is reasonable'" in adjudging defense attorney competence. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), quoting *Strickland*, 466 U.S. at 688.

confidence with an anxious client in a criminal case." ABA Standard 4-3.8, commentary, 177. "[T]he ability of a defendant to select his own counsel permits him to choose an individual in whom he has confidence. With this choice, the intimacy and confidentiality which are important to an effective attorney-client relationship can be nurtured." *United States v. Laura*, 607 F.2d 52, 57 (CA3 1979). When the court and/or the prosecution intervenes to deny the defendant his chosen counsel without justification, the defendant's ability to trust any counsel at all is inherently threatened.

Defendants' confidence that their lawyers are truly *their* counselor and advocate is critical from the moment that counsel is retained. Because "[t]he client is usually the lawyer's primary source of information for an effective defense," counsel is charged with seeking to know "all relevant facts known to the accused" as soon as practicable. ABA Standard 4-3.2(a) & commentary, 152. As a matter of common experience, criminal defendants are often reluctant to disclose unfavorable facts to the lawyer "for fear the lawyer will lose confidence in his or her innocence and thus fail to pursue the case zealously." *Id.*, commentary. Counsel of choice is better able to overcome this natural reluctance because "a lawyer who is privately retained generally has the confidence of the client, who after all has made a conscious choice of counsel." ABA Standard 4-1.2, commentary, 125. On the question of full disclosure to counsel and, indeed throughout the case, "[t]he client's desire to retain the lawyer gives the lawyer's persuasion greater standing with the client." *Id.*

In this regard, it is important to remember that the choice of retaining a particular lawyer is hardly a snap decision. The client often will have developed a list of defense counsel to be considered, with suggestions from a variety of sources,

such as family members, friends, business and social acquaintances, and other attorneys, among others. After initial contact with lawyers identified in order to determine general availability, the client will have selected certain lawyers to meet with. At those meetings, the client will have explored a variety of topics, such as the lawyer's prior experience (both trial and otherwise), the lawyer's proficiency in motion work, the lawyer's familiarity with the court and the prosecution, the lawyer's manner of dealing with his or her clients, the lawyer's current caseload, etc. Only after the client feels that this particular lawyer is the best one to be his counselor and representative will the lawyer be retained. It is this process that molds the trust that the defendant feels in his or her chosen counsel and that produces the confidence to follow the lawyer's advice.

In addition to a duty to initially discuss the objectives of the representation with the client (ABA Standard 4-3.1, p. 147), defense counsel is bound to "keep the client informed of the developments in the case and the progress of preparing the defense" and to "promptly comply with reasonable requests for information." ABA Standard 4-3.8(a), pp. 176-177. A critical part of this duty and of the attorney-client relationship in general is the requirement to "explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." ABA Standard 4-3.8(b), p. 177. Certain decisions -- including what pleas to enter, whether to accept a plea agreement, whether to waive jury trial, and whether to testify in his or her own behalf -- are reserved to the client "after full consultation with counsel." ABA Standard 4-5.2(a), pp. 199-200, As to these, counsel's role is clear: "the accused should have the full and careful advice of counsel." *Id.*, commentary, 201. And, while counsel cannot demand that the client follow the lawyer's advice as to the best course of action nor coerce a decision

through misrepresentation or undue influence, *id.*, "counsel is free to engage in fair persuasion and to urge the client to follow the proffered professional advice." *Id.* The advice of counsel of choice, who generally will have the confidence of the client, will carry greater weight with the client in making these important decisions. ABA Standard 4-1.2, commentary, 125.

The relative roles of client and counsel in other decisions are murkier. The basic rule is that "[s]trategic and tactical decisions should be made by defense counsel," including what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and what evidence to introduce. ABA Standard 4-5.2(b), pp. 199-200. However, counsel's decisions on these matters should be made only "after consultation with client where feasible and appropriate." *Id.* In determining how such client consultation should play into counsel's decisions, the only guidance given is that "[t]he lawyer should seek to maintain a professional relationship at all stages while maintaining the ultimate choice and responsibility for the strategic and tactical decisions in the case." *Id.*, commentary, 202. Counsel is better able to accomplish this delicate balancing act if he or she has been chosen by the defendant and has the defendant's confidence.

"After informing himself or herself fully on the facts and the law," defense counsel must also "advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome." ABA Standard 4-5.1(a), p. 197. In this regard, two points must be recognized: "[t]he lawyer's responsibility to know the law is a challenging one, given the rapid pace of change in many areas of criminal law and procedure," and "elements of uncertainty surround any estimate of probable outcome." *Id.*, commentary, 198.

One of the most important stages preceding any trial is exploration of the possibility of resolving the case without trial through a plea agreement. "Since disposition by plea is mutually advantageous in many circumstances, involvement in plea discussions is a significant part of the duty of defense counsel." ABA Standard 4-6.1, commentary, 204. Indeed, "[p]lea discussions should be considered the norm and failure to seek such discussions an exception unless defense counsel concludes that sound reasons exist for not doing so." *Id.* "[I]n many cases it will be appropriate to make an early contact with the prosecutor to secure information concerning the charge." *Id.* "In the course of this contact, the possibility of reducing the charge or making a plea may arise and counsel may have an opportunity to advance the client's interests without making any disclosures concerning the defense." *Id.* "Especially when good professional relations exist between the lawyer and the prosecutor, even the most casual and informal discussion of the case can produce information useful to the defense." *Id.* at 205-206.

An individual lawyer's experience with the prosecutor may be important in another way. "Courts and prosecutors have developed criteria that guide the exercise of their discretion. These standards and rules of thumb are not to be found in codes, case reports, and other sources of law, but a working understanding of them is part of the accumulated skill and experience of the effective defense lawyer. Ignorance of the prevailing practices and attitudes of the prosecutor and the court as to plea discussions may be as much a handicap to effective representation as is unfamiliarity with the facts or law related to the case; hence, it is imperative that the defense lawyer be or become aware of them." *Id.* at 204.

In deciding whether to approach the prosecutor to discuss the possibility of a resolution without trial, defense

counsel need not generally seek the consent of his client. *Id.* at 205. Indeed, "unless advised to the contrary by his or her client, defense counsel may ordinarily proceed on the assumption, for purposes of discussion with the prosecution only, that the defendant may be willing to enter a plea of guilty to some charge," but counsel can never yield the position that the defendant can and will, if he or she desires, put the prosecution to the proof. ABA Standard 4-6.2, commentary, 207.

Plea discussions are more likely to be productive if counsel can present the prosecutor facts that mitigate the offense or portray the defendant in a more favorable light. Thus, defense counsel "has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing." ABA Standard 4-4.1, commentary, 183. "Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like will be relevant." *Id.* Counsel chosen by the defendant and enjoying his or her trust will be better able to persuade the client to make full disclosure in the more-sensitive of these areas.[4]

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4. Since this Court struck down the mandatory nature of the federal sentencing guidelines in *United States v. Booker*, 543 U.S. 220 (2005), it is even more imperative that the client have full faith and confidence in his or her counsel to whom it might be necessary to divulge painful or embarrassing facts to support sentencing departures that were theretofore prohibited. See, e.g., U.S.S.G. § 5H1.4 (drug or alcohol dependence); *id.* § 5H1.12 (lack of guidance as a youth); *id.* § 5K2.12 (personal financial difficulties); *id.* § 5K2.13 (diminished capacity where the offense involved violence or serious threat of violence).

Defense counsel must keep the client advised of developments arising out of plea discussions, and must promptly communicate and explain all significant plea proposals made by the prosecutor, even if it is one that the lawyer would not approve. ABA Standard 4-6.2, pp. 206, 208. "The decision to plead guilty can be an intelligent one only if the defendant has been advised fully as to his or her rights and as to the probable outcome of alternative choices." ABA Standard 4-5.1, commentary, 198. "The matters on which the defendant needs advice before entering a plea go beyond appraisal of the likelihood of conviction or acquittal." *Id.* "Counsel should inform the defendant of the maximum and minimum sentences that can be imposed, but counsel should also be aware of the sentencing practices of the court and advise the defendant, when that is possible, what sentence is likely." *Id.* "Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, it is proper for the lawyer to use reasonable persuasion to guide the client to a sound decision." *Id.* Here especially, it can be critical that counsel chosen by the client will generally have his or her confidence, and therefore counsel's persuasion will carry greater weight with the client. ABA Standard 4-1.2, commentary, 125.

Thus, the relationship of the defendant and his or her attorney is much more complex and individualized than the government recognizes. As the client treads his or her way through the criminal legal process, his or her confidence in that defense counsel is of the utmost significance and, at any step, may determine where the client's journey will ultimately end. When the client or the client's family has the financial means to retain an attorney, the client has the constitutional right to choose an attorney who is not only competent but whom the client believes in enough to entrust with his or her future. That trust and confidence will be the bedrock of the attorney-client

relationship and will significantly affect each step of the criminal case. When a defendant is wrongly denied the attorney he or she has chosen and has another lawyer foisted upon him or her, interactions between the client and his or her attorney will never be the same, no matter the technical competence of the unchosen attorney. As a result, the defendant may find himself in a trial that his chosen counsel would have avoided. Thus, when the court and/or prosecution intervenes to displace a criminal defendant's chosen counsel, it transgresses the core value of the Sixth Amendment right to counsel, and reversal is necessary without any particularized showing of prejudice.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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